No. 18273

In The United States Court of Appeals for the Ninth Circuit

HARVEY ALUMINUM (INCORPORATED),
GENERAL ENGINEERING, INC., AND
WALLACE A. UMMEL D/B/A WALLACE
DETECTIVE AND SECURITY AGENCY,

PETITIONERS,

VS.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

ON PETITION TO REVIEW NATIONAL LABOR RELATIONS BOARD ORDER

REPLY BRIEF FOR PETITIONER GENERAL ENGINEERING, INC.

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SUMMARY OF ARGUMENT

Some cases have held that the Board may take official notice of facts found in prior decisions for the limited purpose of showing intent or state of mind. *NLRB v. Reed and Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953), *cert. denied*, 346 U.S. 887; 74 Sup. Ct. 139 (1953); *Paramount Cap Mfg. Co. v. NLRB*, 260 F.2d 109 (8th Cir. 1958). The Board may not notice such decisions for the purpose of establishing its jurisdiction.

Even in those cases where the courts have permitted the

Board to notice prior decisions as showing intent, the courts have held that the taking of notice does not shift the burden of proof. In the instant case both the trial examiner and the Board erroneously held that the taking of notice shifted the burden of proof to petitioners, Harvey Aluminum (Incorporated) and General Engineering, Inc.

The case of *NLRB v. Townsend*, 185 F.2d 378 (9th Cir. 1950), *cert. denied* 341 U.S. 909; 71 Sup. Ct. 621 (1951), cited in the respondent's brief, stands for the proposition that the failure to make timely objection before the Board to the taking of official notice of prior Board decisions precludes judicial review of the propriety of that practice. In the instant case the petitioners herein have objected at every stage of this proceeding.

Parties are not precluded from obtaining judicial review of issues by the failure to seek judicial review of similar issues in earlier proceedings. It is enough that the objection urged in this court in this proceeding was urged before the Board. There is nothing in the record in the instant case to support the Board's assumption of jurisdiction. It is submitted that this case as it relates to General Engineering, Inc. should be dismissed.

I Prior Board decisions are not admissible as evidence to support the Board's assumption of jurisdiction.

The Board relies upon four cases from the courts of appeal as holding proper the Board's practice of taking official notice of its prior decisions (Resp. Br. p. 20). Of the four, two hold that official notice may be taken of prior decisions for certain limited purposes. In *NLRB v. Reed and Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953), *cert. denied*, 346 U.S. 887; 74 Sup. Ct. 139 (1953), the issue was whether the employer had bargained in good faith with the union. The court held that the Board could consider past acts of the employer for the purpose of determining the employer's intent. In *Paramount Cap Mfg. Co. v. NLRB*, 260 F.2d 109 (8th Cir. 1958), the Board in an unfair labor practice case admitted evidence of statements hostile to the union attributed to the employer in a prior Board decision in an election

case. The court held that the statements were admissible for the purpose of establishing the employer's state of mind.[1] While some cases hold the Board may notice facts found in prior decisions as establishing an employer's intent or state of mind, it may not rely upon such decisions to establish its jurisdiction where a party objects to their being received.

Even assuming *arguendo* that such decisions could be noticed, the burden of proof does not shift to the employer. In the *Paramount Cap Mfg. Co.* case, *id.*, the court held that the evidence presented by means of official notice did not shift the burden of proof.[2] In the instant case, after taking official notice, the trial examiner placed upon General Engineering, Inc. and Harvey Aluminum (Incorporated) the burden of showing the noticed conclusions to be incorrect (Tr. 1421).

In *NLRB v. Brown & Root Inc.*,[3] 203 F.2d 139 (8th Cir. 1953) the court considered whether a previous determination that two employers were not to be treated as a single employer was res judicata in a subsequent proceeding. The court determined that it was not necessary to decide this question since the record before the court was inadequate to sustain the Board's decision that the two employers should be treated as a single employer.[4]

II Matters urged before the Board may be raised on review.

The Board relies upon *NLRB v. Townsend*, 185 F.2d 378 (9th Cir. 1950), *cert. denied* 341 U.S. 909; 71 Sup. Ct. 621

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[1] 260 F.2d at 112.

[2] The court declared:

"Hostility toward the union was not in itself an unfair labor practice and a presumption that such a state of mind once proven was presumed to continue did not shift the burden of proving the unfair labor practice * * *." 260 F.2d at 112.

[3] This case is cited in the Board Brief as *NLRB v. Ozark Dam Constructors*. Its title in the Federal Reports is as shown above.

[4] The court declared:

"But if the issue was not *res judicata* in the strict sense, we are still of the opinion that *there is an inadequate basis in the record* for visiting the sins of Ozark upon Flippen * * *." (Emphasis added.) 203 F.2d at 146.

(1951) as a decision of this court sustaining its position. In that case the Board took official notice of a prior decision that the company from whom the respondent purchased new cars received a large portion of its cars from another state. The court held that since the respondent had failed to object, either at the hearing or in exceptions filed with the Board, to the taking of official notice he was precluded from raising the issue on review.[5] In the instant case the petitioners objected at the hearing to the taking of official notice (Tr. 1420-1423). They sought to obtain a statement as to what "facts" were to be noticed or otherwise relied upon (Tr. 1422). None were specified. They called to the trial examiner's attention the fact that appeals were pending in this court in two of the cases (Tr. 1423). This petitioner filed with the Board exceptions to the reliance upon official notice by the trial examiner in his intermediate report and to the "findings" based upon official notice (R. 45-48, Exceptions 4-8,10-14). Petitioner Harvey moved the Board to reopen the proceeding to present evidence refuting the findings contained in the prior Board decisions (R. 41).[6] The Board denied the motion to reopen on two grounds. The first was that the trial examiner's use of official notice was proper. The second was that the trial examiner's decision was supported by the record in the instant case and that for that reason Harvey and General were not

[5] The court declared that the failure to object to the "receipt in evidence of the prior decision by the *questionable procedure of taking judicial notice* or to the finding of the basic fact rested thereon * * * precluded judicial review. (Emphasis added.) 185 F.2d at 380.

[6] In the opening brief for General Engineering, Inc. General was incorrectly referred to as the party moving to reopen the record. However, there is no question but that General is a "person aggrieved" by the Board's order denying the motion to reopen. 61 Stat. 149, 29 USC 160(f). Had Harvey been successful in refuting the noticed matter Harvey and General could not have been held to be a single employer.

Cf. Sec. 10(a) of the Administrative Procedure Act. Sec. 10(a) provides for judicial review by any person adversely "affected or aggrieved by any agency action." 60 Stat. 237, 5 USC 1009(a). Under Sec. 2(b) of the APA "person" includes organizations of any character other than agencies. 60 Stat. 237, 5 USC 1001(b). Agency action includes "the whole or part of every agency order * * * or denial thereof, or failure to act." 60 Stat. 237, 5 USC 1001(g).

harmed by the taking of official notice (R. 131). The Board's brief makes no reference to any fact in the record of the instant case tending to support the Board's conclusion. It is submitted that there is none.

The Board's brief does make extensive references to statements regarding Harvey Aluminum (Incorporated) and General Engineering, Inc. contained in prior Board decisions (Resp. Br. 21-23). Apparently it is now the Board's position that these are the facts which were noticed. At no point in the trial examiner's intermediate report nor in the Board's decision is there any reference to the evidential facts relied upon. This failure prevents the parties from knowing and meeting the information considered by the Board. Nor can this court determine what evidential facts, if any, the Board relied upon in making its decision.

The Board's brief refers to the failure of General Engineering to raise the issue of the identity of the parties in *General Engineering, Inc. v. NLRB*, 311 F.2d 570 (9th Cir. 1962), (Resp. Br. p. 24). The Board does not contend that that decision renders the question res judicata in this proceeding.[7] Rather, it seems to be the Board's position that the failure to seek review on an issue precludes the review of similar issues in all subsequent cases. It is submitted that it is enough that an objection has been urged before the Board. 61 Stat. 148, 29 USC 160(e).[8] The objection urged here has been raised at every step in this proceeding.

It is submitted that the Board improperly relied upon official notice as establishing its jurisdiction of General Engineering. The Board's decision is unsupported by the record.

CONCLUSION

For the reasons stated it is respectfully submitted that the

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[7] Section III.C. of this petitioner's opening brief is devoted to the question of whether the prior decisions as to the identity of General and Harvey render that issue res judicata in this proceeding (Gen. Engr. Br., p. 12-13).

[8] Section 10(e) of the Act provides in material part:

"No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court * * *." 61 Stat. 148, 29 USC 160(e).

Board's order as it relates to General Engineering, Inc. should be reversed and the case dismissed.

RHOTEN, RHOTEN & SPEERSTRA

By: WILLIAM B. WYLLIE

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General Engineering, Inc.

January 1964

CERTIFICATE

I certify that in connection with the preparation of this reply brief I have examined Rules 18 and 19 of this court and that in my opinion the foregoing reply brief is in full compliance with those rules.

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No. 18273

In the

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For the Ninth Circuit

HARVEY ALUMINUM (INCORPORATED), GENERAL ENGINEERING, INC., and WALLACE A. UMMEL d/b/a WALLACE DETECTIVE AND SECURITY AGENCY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

NATIONAL LABOR RELATIONS BOARD,
Cross Petitioner.

REPLY BRIEF OF PETITIONERS HARVEY ALUMINUM (INCORPORATED) AND WALLACE A. UMMEL

Petition to Review Decision and Order of the National Labor Relations Board and Cross Petition to Enforce

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v.

NATIONAL LABOR RELATIONS BOARD,
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Petition to Review Decision and Order of the National Labor Relations Board and Cross Petition to Enforce

REPLY BRIEF OF PETITIONERS HARVEY ALUMINUM (INCORPORATED) AND WALLACE A. UMMEL

I.

The Board concedes that Davis, Hahn and Moore gave statements respecting the subject matter of their direct testimony to the FBI and the Department of Labor (Bd Br 9, 12, 14) and that these witnesses provided *all* of the direct evidence supporting the charges (Bd Br 26-27). It asserts only that the record shows that General Counsel never had, never saw and never used the statements or copies or excerpts from them (Bd Br 10, 18, 29, 32, 33, n 20). This factual contention is so manifestly unsupported by the record as to reflect little credit on the Board.

The Board relies upon Mr. Henderson's examination on June 14, 1961 of his own trial file (Tr 136-148, see also Tr 404-406; Bd Br 11-12, 28-29) and the official statement of General Counsel issued six weeks later on July 25 (Tr 1016; Bd Br 16). It assumes that whenever Mr. Henderson stated that "we" did or did not do something, he spoke for General Counsel and his entire organization (Tr 116, 118-119, 331; Bd Br 10).

Possession of the Statements

In actual fact, Mr. Henderson limited his statements to the contents of his own files (Tr 137-138), and he expressly and repeatedly disclaimed knowing what other representatives of General Counsel might have in theirs (Tr 128, 992, 1017, see Tr 995). When he searched his own file, he refused even to state whether it contained any notes of the witness statements, and the Trial Examiner excluded such notes from his request (Tr 142, 147). There is no evidence that Mr. Henderson ever examined any other files of General Counsel or requested that they be examined by anyone else.

Further, both his statement and that of General Counsel were limited to documents deemed by them to be subject to production under Reg § 102.118 (Tr 128-129, 138, 142-143, 148, 1016), and no cross examination was permitted or additional information furnished which would allow their judgments to be tested. This was a critical qualification, for the Examiner (Tr 998) and the Board (R 130) both held that statements given to the other agencies, whether or not in General Counsel's possession and regardless of their form, are not

subject to production under the regulation.[1] Petitioners therefore could not and did not "accept" Mr. Henderson's representation that he had produced "everything" from his own file (Bd Br 12).

Use of the Statements

No one, including Mr. Henderson, ever denied that General Counsel had access to and use of these critical witness statements in preparing his case, and the Board's repeated assertions to the contrary are entirely unsupported by the record.

The matter arose twice during the hearing. When Mr. Henderson was examined by petitioners' counsel on June 14, 1961 he refused to state whether the statements had been used in preparing the Government's case (Tr 124-125); whether he had copies or notes of them (Tr 120-121, 122-124); whether he had seen them (Tr 123); whether he had discussed them (Tr 123-124); or whether he had had access to them (Tr 126).[2]

The second occasion was when General Counsel's official statement was read into the record on July 25, 1961:

> "* * * the Washington office has no copies of any statements which would be subject to production under the regulations of the Board, in addition

1. The Board on this appeal has apparently abandoned that position (Bd Br 36, n 23), which was, however, the basis of the rulings below.

2. The Board misrepresents both the record and petitioners' position (Bd Br 10, n 6). Mr. Henderson expressly refused to state whether he had such statements in his possession (Tr 123; see Pet Br 10, n 9). His "denial" that "we" had them was ambiguous in view of his refusal and was limited to statements deemed by him to be subject to production under the Board's regulation (Tr 128).

to those which have already been made available * * *"

Petitioners again tried to determine if General Counsel had used or had access to the statements in preparing his case. Mr. Henderson refused to answer their questions. When he was asked

> "* * * whether they had access to the statements taken by any of the other departments or discussed the contents of those statements with people in the other departments?"

his answer was

> "No, my statement doesn't go to that. That, I don't know." (Tr 1017)

He refused to disclose whether the Washington office had any notes of the statements and denied having personal familiarity with the Washington files (Tr 1017). After further refusals to give such information (Tr 1018) the following occurred:

> "MR. ELLIOTT: Then to recapitulate, do I understand, Mr. Henderson, that you are not authorized to state whether or not anyone in the General Counsel's office has seen, reviewed or taken notes of any statements in the possession of any other agency?
>
> MR. HENDERSON: You are correct; I am not." (Tr 1019)[3]

3. The foregoing portions of the transcript demonstrate the gross inaccuracy of the Board's conclusion that petitioners merely sought to question Mr. Henderson about "the contents of the Board's files and the Board's investigation of the case" (Bd Br 16).

General Counsel had refused petitioners' request that Mr. Henderson and Mr. Stratton be permitted to testify about the statements (Tr 531-533). However, after stating that he could add nothing to General Counsel's official statement, Mr. Henderson said that "we" had not destroyed or given back any statements (Tr 1018-1019). This denial, which could not be tested by cross examination, gives graphic substance to petitioner' complaint:

> "* * * I want to point out for the record that now General Counsel can testify without the permission of the Board; but when we have problems that we need clarified, this can't be done." (Tr 409; see also Tr 411, 543-546)[4]

The Board contends that the regulation is comprehensive and exclusive in Board proceedings; that no statements not in the present possession of General Counsel and within the regulation as construed by him alone can be secured from him or anyone else, even by subpoena; and that he need not give any information about them or his use of them (R 130; Bd Br 35-37, 43-44).[5] This position is of such far reaching importance as to make the Board's reliance on what it now asserts to be the record little more than a screen for its much more ambitious claim.[6] If it is approved it can only be

4. Compare the Board's present claim that it "made every effort to accord petitioners every right to which all parties appearing before it are entitled" (Bd Br 49, see also Bd Br 30).

5. The Trial Examiner agreed with this analysis (Tr 990, 993).

6. Compare the thorough search of Government files and full disclosure by Government counsel in *US v. Paroutian*, (CA 2 1963) 319 F2d 661 at 664, in which it was doubtful if a statement had been taken.

because the ultimate decision whether to comply with *Jencks* rests in the administrator's discretion.

II.

The Board describes its decision below as holding only that

> "* * * The Board held that counsel for the General Counsel had given to petitioners copies of all the witnesses' statements in his possession, and that petitioners were not entitled to anything else upon demand as a matter of right (R. 129-130)." (Bd Br 17)

This misleading description must be compared with the much broader and detailed terms of its actual decision (R 130). Counsel's reference tends to conceal the improper basis on which the Board resolved these questions and the claims which it actually asserts in this case.

III.

The Board ignores petitioners' contention (Pet Br 36-47) that General Counsel asserts an exclusive and non-reviewable authority to determine what is producible under the law and its regulation.[7] That authority would follow, however, from the Board's repeated suggestion that *Jencks* is merely a procedural device, that the adoption of the proviso to Reg § 102.118 was a voluntary concession to those appearing before it,

7. While Mr. Henderson offered to turn over to the Trial Examiner everything in his own file which might be considered to be a statement subject to production under the regulation, the Board's General Counsel made no such offer.

that "the Board's rule, not *Jencks*, controls", and that the Board merely "adapted" *Jencks* "to the requirements of its proceedings" (Bd Br 36-37).[8] The Court should well consider the Board's effort to turn a basic requirement of fair play into a matter of administrative grace. *Jencks* is not merely a rule for the production of impeaching evidence; it requires disclosure of the facts relating to that evidence (Pet Br 39-43), and it was imposed on the Board, as on other administrative bodies, by judicial insistence.[9] The questions in this proceeding, which the Board does not answer, are whether the regulation as construed by the Board complies with the rule, whether it was properly construed, and whether its application was not arbitrary and unreasonable.

IV.

The Board's brief contains other errors, both of fact and implication.

a. The Board complains that petitioners were not interested in seeing the statements, but only in making a technical record and "laying procedural traps" (Bd Br 10, 30). These charges are patently untrue. Mr. Lubersky did, indeed, insist on questioning Mr. Henderson under oath after he had made the general statement that "we do not have the statements" and that he would

8. See also Bd Br 43:
"* * * *Jencks* does not apply to Board proceedings except insofar as its precept has been incorporated in the proviso to Section 102.118. * * *" The Board relies on § 10(b) of the Act (not § 10(c) as it states) in asserting that the "rules of evidence" to which it "adapted" *Jencks* are those set forth in the Federal Rules of Civil Procedure (Bd Br 36-37).

9. *NLRB v. Adhesive Products Corp.*, (CA 2 1958) 258 F2d 403 at 408; *Communist Party v. SACB*, (CA DC 1958) 254 F2d 314 at 328.

say nothing more (Tr 117-119). The questions, far from being "loaded" (Bd Br 32, n 19) or a "trap", were of obvious benefit to General Counsel, for they specifically described the nature and extent of petitioners' demands and illustrated the importance they attached to the questions involved. The Board cannot be serious in suggesting that petitioners' counsel should fail to make a record of their position for consideration by this Court.

The further statement (Bd Br 30) that petitioners sought to "prevent Henderson from testifying as to whether he had any notes of an interview with Moore" is also incorrect. Petitioners did not do so (Tr 403); they objected only to his self-serving elaboration of that testimony seeking to explain how he happened to know that he had none and his attempt to impeach the testimony of his own witness that notes were in fact taken (Tr 405-407).

b. Contrary to the Board's statement (Bd Br 9; see Pet Br 48), the record does not disclose the purpose of the Department of Labor and the FBI in taking the witness statements (see Tr 114, 144 cited by the Board), nor does it disprove petitioners' suggestion of interagency cooperation in making evidence available for use by an agency other than the one which acquired it. The Board admits that if the FBI or the Department of Labor were "aiding the Board in its investigation, * * * the Board would, of course, have been under a duty to produce the statements" (Bd Br 37).[10] Surely,

10. This is inconsistent with the Board's position elsewhere (Bd Br 35-37, 43-44) that under Reg § 102.118 only statements in the present possession of General Counsel can be secured, even by subpoena.

then, the Board must admit that petitioners were entitled to be advised whether the statements had been made available to General Counsel in aid of his case.

c. The Board does not deny that part of the Hahn memorandum was in a form subject to production (Tr 344; Bd Br 12-14, 45-47), but relies in support of the failure to produce it on the Trial Examiner's conclusion, after much uncertainty, that it added nothing to the affidavit already given petitioners and contained only the impressions of Mr. Stratton (Tr 352-354). It ignores the Trial Examiner's statement that there might be inconsistencies between the memorandum and the affidavit (Tr 344), Mr. Lubersky's statement that he wanted to examine it (Tr 334), and the Trial Examiner's reliance on the Jencks Act, which counsel claims is not applicable to Board proceedings (Tr 349-350; Bd Br 36).[11]

d. The Board contends that the regulation substantively limits petitioners to witness statements currently in General Counsel's possession, and that statements cannot be subpoenaed from anyone else, because this would lead to the production of documents not described in the regulation.[12] It seeks to sustain its position by asserting that it has no authority over the files of other agencies and that its subpoenas cannot run to the heads of other departments (Tr 993, 996; Bd Br 19,

11. The Board originally agreed with the Trial Examiner that the Act applied (R 130), but has apparently changed its position on this appeal.

12. Contrary to the Board's suggestion (Bd Br 11), the subpoenas to General Counsel, the Secretary of Labor and the Attorney General, although completed on June 14, were not served until June 21 (see Tr 136; Exhs 1A, 1B and 1C).

35-36, 43-44; see R 130). No authority is cited in support of any of these contentions, and they are incorrect.[13]

Reg § 102.118 is not a restriction upon and does not relate to the subpoena power or the right of a respondent to secure evidence for its defense. It concerns only General Counsel's obligation to produce witness statements, not anyone else's. It is neither exclusive nor comprehensive, and there is no limitation in either the statute or the applicable regulation on persons to whom or the evidence for which Board subpoenas will issue, provided only that the evidence required to be produced is sufficiently described and is relevant to the proceeding. Neither the Trial Examiner nor the Board is given any discretion in issuing them (*NLRB v. Duval Jewelry Co.*, (1958) 357 US 1).[14] Legal objections to complying with them can be asserted by the persons subpoenaed, including agency heads, in enforcement proceedings in District Court. This was obviously the procedure contemplated by Congress in enacting § 11(1) of the 1947 Act, and it is the only procedure which is consistent with its clear and unambiguous terms.[15]

e. The Board seeks to distinguish between impeaching and substantive evidence and argues that petitioners

13. As to the second proposition, see Pet Br 72-74; *Machin v. Zuckert, Secretary of the Air Force*, (CA DC 1963) 316 F2d 336. As previously shown, a deliberate failure to retain possession of such statements or copies would itself amount to a wilful failure to produce them (Pet Br 44 and cases there cited).

14. 78 S Ct 1024, 2 L Ed 2d 1097.

15. The Board's position does not reach the further question whether, on these facts, there was a duty to attempt under § 11(6) of the Act to secure the statements from the other agencies for petitioners' use.

failed to make a sufficient showing of "need" to justify production of merely impeaching evidence (Bd Br 26, 32-33, 38-39). It asserts that *Tomlinson of High Point, Inc.*, (1947) 74 NLRB 681 and *Carpenters' Local Union No. 224 (etc.)*, (1961) 132 NLRB 295 are inapplicable, because the evidence referred to in those cases was substantive, not impeaching evidence (Bd Br 38-39).

1. No authority has been cited supporting the view that petitioners' rights (or need) are controlled by the substantive or impeaching nature of the evidence. In *Carpenters' Local*, indeed, the Board expressly stated that it would disregard the testimony of the witness, *because he could not be adequately cross examined by respondents without the evidence which the state agency refused to produce* (at 298). The charge was dismissed, because without his testimony there was no evidence of a violation.

2. Under *Jencks v. US*, (1957) 353 US 657,[16] a conclusive showing of need is made when it is shown that the statements were given to the Government (see Pet Br 30-32).[17] It was the very heart of *Jencks* that impeaching evidence is important evidence and that an improper refusal to produce it is a denial of right.

3. Furthermore, subpoenas would issue for substantive evidence in the possession of third persons, and

16. 77 S Ct 1007, 1 L Ed 2d 1103.

17. The reason is obvious and simple:

> "* * * the determination of whether a conflict between the testimony and the documentary evidence exists cannot be made without the inspection by the court of the pertinent documents."
>
> *Schauffler v. Local No. 107*, (DC ED Pa 1960) 196 F Supp 471 at 473, by Ganey, J.

See also *State v. Ashton*, (Ariz 1963) 386 P2d 83 at 84-85.

these statements would be a proper (and probable) source of such evidence.

4. This is not simply a case of official inaction. General Counsel's unexplained refusals to furnish information about the statements or to permit his agents to do so, or to request the statements from other agencies, and the Trial Examiner's revocation, since affirmed, of the subpoenas directed to their chiefs, were affirmative acts which hindered petitioners and suppressed the facts, and which prevent the Board from contending in this Court that they failed to establish any "need" or "good cause" for examining the statements. This record is the Board's own creature. It admits that the statements were given and that they related to the witnesses' testimony on direct examination. The record shows that General Counsel aided in the effort to avoid producing them.[18] This conclusively satisfied any conceivable criterion of "need".

f. In the same vein, the Board cites Rule 34 of the Federal Rules of Civil Procedure and argues that it revoked the subpoenas for a lack of a showing of "good cause", a ground never before asserted (Bd Br 44-45).[19] Even if this were a permissible ground of revocation under § 11(1) of the Act, the same facts which establish petitioners' need also satisfy any requirement of

18. This assistance even extended to Mr. Henderson's purported representation of the Attorney General and the Secretary of Labor in moving to revoke the subpoenas.

19. The Board does not explain how the reference to the federal rules in § 10(b) can operate to destroy the limitation on the Board's power to revoke its subpoenas contained in § 11(1). Those rules are only to be applied "so far as practicable," and they clearly do not authorize substantive changes in other provisions of the statute.

"good cause" under Rule 34, and the contention is without merit. See 4 Moore's Federal Practice (2d ed 1963) 2460-2461 (§ 34.10).

The proper application of *Jencks* to Board proceedings is an independent requirement which cannot be avoided by reference to the same federal rules which the Board ignores in arguing that it could deny petitioners the deposition of Lee Caldwell (Bd Br 47-48).[20] The Board, it seems, will rely on § 10(b) to avoid an obligation, but rejects it when it would impose one.

g. The Board contends that the subpoena to General Counsel extended to material not subject to production under *Jencks*,[21] and that General Counsel's statement in his petition to revoke, that the "documentary evidence required to be produced in response to the subpena" is in Regional and other files under his control "*could have* referred merely to that material" (Bd Br 30-31; emphasis supplied). It supports this devious suggestion by a wholly irrelevant reference to Mr. Henderson's earlier examination of his own file and concludes that "it is quite clear" that this is what the admission referred to. However, as shown above (supra 2, 4), Mr. Henderson repeatedly disclaimed familiarity with anything but the current contents of his own trial file, and the admission remains unexplained in the record.

20. Similarly, the Federal Rules of Criminal Procedure make no reference to the *Jencks* principle, but it was not for that reason inapplicable to criminal proceedings, even before the Jencks Act was passed.

21. Contrary to the Board's assertion, petitioners have never contended that they should be allowed to sack through General Counsel's files; they would not if they could (Tr 995; see Bd Br 30, n 18).

h. The Board contends (Bd Br 38) that its failure to request the statements from the other agencies under § 11(6) of the Act did not prejudice petitioners, because the FBI and the Department of Labor had petitioned for revocation of the subpoenas, and the request would have "added nothing". It would, of course, have added substantially to the situation after the subpoenas were revoked, even if we assume that Mr. Henderson had authority to file the petitions. A request under § 11(6) must be honored under presidential direction and might well have been honored voluntarily without it; the petitions for revocation are not conclusive of the agencies' position in other circumstances. In this case, the Board ran interference, and they were never required to make a decision. The Board cannot assert that there was no prejudice.

i. The Board concedes that *NLRB v. Cashman Auto Co.*, (CA 1 1955) 223 F2d 832, like *NLRB v. Duval Jewelry Co.*, supra, (1958) 357 US 1 at 7, holds that the Board's power to revoke its subpoenas is limited to the grounds in the statute, and that neither ground is involved here (Bd Br 41-43). It refers to, but disclaims reliance upon the further holding in *Cashman Auto* that the respondent there had waived its rights by failing to seek enforcement. It states:

> "* * * The record is barren of any request by petitioners that the General Counsel seek judicial enforcement of the subpoenas." (Bd Br 41)

This is incorrect. Petitioners made a specific request for judicial enforcement of the subpoenas (Tr 219).

Furthermore, as pointed out by petitioners (Pet Br 68), the court was not faced in *Cashman Auto* with the improper allowance of a petition to revoke, for in that case there was no such petition. Instead, there was an independent refusal to obey the subpoena—a refusal made outside the proceedings. In this case there was no disobedience to the subpoenas, but only their wrongful revocation by the Trial Examiner, since affirmed, which left nothing to enforce.

Counsel's argument that administrative convenience requires that *Duval Jewelry Co.* and *Cashman Auto* be rejected and that the statutory grounds of revocation should be regarded as "illustrative only" (Bd Br 42) is unconvincing. Federal District Courts pass daily upon discovery claims in civil litigation and will scarcely collapse under the weight of an occasional enforcement proceeding.

The cases cited (but not discussed) by the Board in support of its position (Bd Br 42-43), insofar as they relate at all to the revocation of its subpoenas under present law, are cases in which the applicant sought to penetrate the Board's own files.[22] They hold only that the "simple requirements" of Board regulations controlling its own files are controlling in the absence of any showing of need.[23] They did not concern subpoenas

22. See *NLRB v. Jamestown Sterling Corp.*, (CA 2 1954) 211 F2d 725; *NLRB v. Quest-Shon Mark Brassiere Co.*, (CA 2 1950) 185 F2d 285, cert den (1951) 342 US 812. In *NLRB v. Thayer Co.*, (CA 1 1954) 213 F2d 748, cert den (1954) 348 US 883, which was decided three years before *Jencks*, the court expressly disregarded the Government's contention that the revocation was proper under Reg § 102.31, but held that the petitioners had made no showing under substantive law entitling them to production of the statements.

23. The Board does, of course, have limited statutory authority to control its own files (Pet Br 54).

directed to third persons or defenses or objections which such persons might have to complying with them, nor was the present question of the Board's basic authority under the law mentioned or discussed.

Finally, even if the Board's position were correct, none of the non-statutory grounds asserted in the petitions and relied on by the Trial Examiner were legally sufficient to support the order of revocation (Pet Br 62-77).

j. The Board suggests (Bd Br 44-45) that impeachment of these three witnesses would have been merely cumulative, because they were already shown to be unreliable. These, however, were witnesses whom the Trial Examiner and the Board believed and relied on and for whose credibility General Counsel vouched. Impeachment of their direct testimony, was obviously of critical importance, and the Board cannot assert that it already knows they were lying.

k. The Trial Examiner erred in denying petitioners' motion for the deposition of Lee Caldwell. Petitioners have never suggested that this witness' "testimony after the recess would be different" (see Bd Br 47-48). Rather, in view of the admitted perjured testimony already received and the generally low character of the Government's witnesses, the deposition was peculiarly necessary so that a rebuttal could be prepared. There was a conclusive showing of "good cause" which terminated the Trial Examiner's discretion under Reg § 102.30, and the motion should have been allowed. This position, we submit, is fully "worthy of reply".[24]

24. Indeed, Mr. Caldwell's testimony was contradicted by Mr. Evans, an agent of the Department of Labor (Tr 2768).

V.

a. The Board admits that "thievery was rampant" (Bd Br 27). The ultimate issue in the case is whether Wallace Ummel investigated that thievery or union activity. On appeal, the question is whether the record supports the finding that it did the latter.

The testimony of the Government's witnesses was believed, because the Trial Examiner found that Cronkrite's testimony contained "inherent improbabilities" and should not be believed because he "admitted that no action was taken about the reports of thefts which were made" (Bd Br 27; R 164).

The Board has again overreached the record. Action was taken. The information was turned over to the Sheriff of Wasco County, Oregon and the District Attorney was consulted (Pet Br 104). However, the mistaken conclusion that Harvey made no use of the theft reports was the basis on which the Trial Examiner and the Board accepted the testimony of the Government's witnesses (Pet Br 101). It led them to disbelieve Cronkrite's testimony, and that disbelief was the touchstone which, as if by magic, rendered credible the testimony of Davis, Hahn and Moore, and also of Mr. and Mrs. Siemens (Bd Br 27; R 164). But for this mistake regarding the "non use" of the reports, Cronkrite's testimony would have been credited (Pet Br 101; Bd Br 27); if it had been, no finding of an unfair labor practice could have been made.

The record also shows that no use was made of the alleged reports of union activity, and that there was no

discrimination against any employee because of union sympathy. All of the affirmative evidence was to the contrary (Pet Br 95), and the Board does not deny it. Furthermore, in *General Engineering, Inc. v. NLRB*, (CA 9 1963) 311 F2d 570 this Court considered the record of an NLRB election held at Harvey's plant at The Dalles, Oregon in August, 1961. The charging party in this case was on that ballot and lost. The election was held after the period of alleged labor espionage (June-September, 1960) and at a time when the Board and the charging party knew all of the circumstances relating to the present charge. In fact, that election was held during the month in which the hearing in this case finally ended. No objections were filed to the election, and this Court held that

> "* * * it is unquestioned that this election was properly held under circumstances which permitted the employees to freely choose their bargaining representative without restraint, coercion, threatened reprisals or interference by petitioners. In our view, such certificate makes moot all portions of the order under review which relate to the representation case. * * *" (311 F2d at 572)

If the espionage activities complained of had actually occurred as charged in this case, the election could not possibly have been held under circumstances completely free of "restraint, coercion, threatened reprisals or interference", nor would the charging party have failed to raise the question.

If the alleged non use by Harvey of the thievery reports establishes that Cronkrite's testimony is unbeliev-

able and that the testimony of the Government's witnesses should be credited, the non use of the alleged espionage reports equally compels the conclusion that those who testified about them also lied, that there was in fact no espionage and that charging party and its purchased witnesses knew it. In short, if conclusions are to be drawn from the use or non use of reports, those conclusions support the testimony of Cronkrite and contradict the testimony of the Government's witnesses.[25]

b. The Board admits that "the only direct evidence" of labor espionage "is contained in the testimony of Davis, Hahn and Moore" (Bd Br 26), but argues pro forma that its findings are nevertheless supported by indirect evidence in the form of testimony of Frank Vernon Siemens and Mrs. Siemens (Bd Br 27). It fails to point out that the events in which Mr. and Mrs. Siemens were involved and about which they testified all occurred before any of the alleged espionage activities. Neither witness testified to any act of labor espionage, but only to an alleged intent to employ Ummel for such purpose at a later time. Consequently, the Siemens' testimony amounts only to evidence of that intent, not that it ever was carried out, and it does not constitute substantial or any evidence of the charges.

The record is devoid of any credible evidence of labor espionage. The findings below were erroneously bottomed on an unwarranted inference that Cronkrite's testimony was "incredible", which was in turn based

25. The Board would dispose of petitioners' case on the basis of Cronkrite's testimony alone. It ignores the testimony of numerous other employees of Wallace and Harvey which contradicted the Board's witnesses and fully supported the testimony of Cronkrite and Wallace Ummel (Pet Br 82-83).

upon the mistaken factual conclusion that the reports of thievery were not used.

CONCLUSION

The Board almost concedes that error was committed in the proceedings (Bd Br 49), but suggests that dismissal of the charges would be improper because its conduct was not wilful. We think the record supports no other conclusion but that the Board in a proceeding which it knew was protracted and of intolerable expense to the parties, in which its case was weak and the charges serious, wilfully and deliberately violated petitioners' rights. Any rehearing would have to be conducted before a different Trial Examiner, one who has not already resolved questions of credibility in his own mind, and would be as protracted and costly as the first one. The inequity and prejudice of further proceedings require that the order of the Board be reversed and set aside.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney